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No. 87-996

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE, PETITIONER

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether claims against an insolvent federally-insured savings and loan association that has been placed in receivership must be presented in the first instance to the receiver in accordance with the Federal Home Loan Bank Board's regulations.

2. Whether requiring creditors of insolvent federally-insured savings and loan associations to exhaust their remedies under the Bank Board's regulations before seeking judicial enforcement of their claims violates Article III of the Constitution, the Due Process Clause of the Fifth Amendment, or the Seventh Amendment right to trial by jury.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 829 F.2d 563. The order of the district court (Pet. App. A5-A6) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A8) was entered on October 16, 1987. The petition for a writ of certiorari was filed on December 14, 1987, and was granted on March 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. IV) 1461 *et seq.*, the National

Housing Act, 12 U.S.C. (& Supp. IV) 1701 *et seq.*, and regulations promulgated by the Federal Home Loan Bank Board (12 C.F.R. 549.4) are reproduced as an appendix to this brief.

STATEMENT

This case arises from the decision of the Federal Home Loan Bank Board (Bank Board) to appoint the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for FirstSouth, F.A., a federally chartered and federally insured savings and loan association havings its principal place of business in the State of Arkansas. Petitioner Coit Independence Joint Venture (Coit) seeks review of the court of appeals' decision dismissing its suit against the receiver on the ground that FSLIC has "exclusive jurisdiction" (Pet. App. A2, A3) over claims against a failed savings and loan association for which the Bank Board has appointed FSLIC the receiver. Before turning to the facts of this case, we describe the applicable statutory and regulatory framework.

A. *The Statutory And Regulatory Scheme*

Savings and loan associations (S&Ls) are financial institutions that lend money and provide interest-bearing savings accounts. In the past, S&Ls tended to be smaller than commercial and savings banks, and they historically have had substantially more limited functions. For most of their history they have been the principal source of home-mortgage loans. See F. Ornstein, *Savings Banking: An Industry in Change* (1985); T. Marvell, *The Federal Home Loan Bank Board* 4 (1969).

Prior to 1932, the regulation of S&Ls was left entirely to the states. S&Ls, their borrowers, and their depositors

were severely affected by the Great Depression,[1] however, and the federal government took important steps to ease that crisis and forestall future ones. First, Congress enacted the Federal Home Loan Bank Act, ch. 522, 47 Stat. 725, whose main purpose was to create a source of funds that could be loaned to S&Ls to increase their liquidity. T. Marvell, *supra,* at 20. The Act created the Federal Home Loan Bank Board to oversee the process. Congress next passed the Home Owners' Loan Act of 1933 (HOLA), ch. 64, 48 Stat. 128. Among other things, HOLA provided for the creation of federal S&Ls to be chartered and regulated by the Bank Board. Congress completed the "S&L trilogy" with the National Housing Act (NHA), ch. 847, 48 Stat. 1246. The NHA established a program of federal insurance for the deposit accounts of both federally and state-chartered S&Ls and created FSLIC to administer the program. The NHA also provided for the appointment of FSLIC as receiver of federal (and in some cases state) S&Ls that are in need of receivership.

HOLA today accords the Bank Board broad and detailed authority to charter, regulate, and liquidate federal S&Ls (12 U.S.C. (& Supp. IV) 1464). "Pursuant to this authorization, the Board has promulgated regulations governing 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.' " *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 145 (1982) (quoting *People* v. *Coast Federal Savings & Loan Ass'n,* 98 F. Supp. 311, 316 (S.D. Cal. 1951)).

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[1] During the Depression years at least 20% of American homeowners were unable to keep current on their mortgage payments. Despite a foreclosure rate of 240,000 per year, declining property values and massive depositor withdrawals resulted in the failure of some 1,700 S&Ls during the 1930's, with losses to depositors of $200 million. T. Marvell, *supra,* at 18-19.

The NHA requires FSLIC to insure the accounts of all federally-chartered S&Ls (12 U.S.C. 1726(a)(1)) which in turn are obligated to pay premiums into the insurance fund, as well as to undergo periodic examinations (12 U.S.C. 1726(b)). The statute also permits FSLIC to insure the accounts of state-chartered S&Ls pursuant to the same conditions (12 U.S.C. 1726(a)(2) and (b)). If an insured S&L defaults,[2] FSLIC is required to pay that S&L's depositors (either by a cash payment from its insurance fund or by a transferred account in a new institution) "as soon as possible" (12 U.S.C. 1728(c)). Avoiding defaults and the concomitant need to make payouts is of course an important concern of FSLIC and the Bank Board. See T. Marvell, *supra,* at 97.

Recognizing the importance of minimizing defaults, Congress gave FSLIC the power to render a variety of types of financial assistance to ailing S&Ls (12 U.S.C. 1729(f)). Congress also put at the Bank Board's disposal various mechanisms for deterring and terminating activities of a federal S&L or its officials that the Bank Board deems to present a risk to the S&L's financial well-being (12 U.S.C. 1464(d)(1)-(5)).

A federal S&L is not eligible to become a bankrupt (11 U.S.C. (& Supp. IV) 109). Its only statutory path to a "corporate grave" is Section 5(d)(11) of HOLA, which gives the Bank Board power "to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations * * * and for the conduct of conservatorships and receiverships" (12 U.S.C. 1464(d)(11)). In particular, the Board has power to ap-

[2] "The term 'default' means an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation" (12 U.S.C. 1724(d)).

point a receiver for a federally chartered S&L, ex parte and without prior court approval, when one or more of the following grounds exists (12 U.S.C. (Supp. IV) 1464(d)(6)(A)):

> * * * (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound conditions [*sic*] to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board.

Both HOLA and the NHA make clear that only FSLIC may be the receiver for a federal S&L (12 U.S.C. 1464(d)(6)(D), 1729(b)). The NHA also permits FSLIC to serve as receiver for a federally-insured state S&L if selected by the proper state authority (12 U.S.C. 1729(c)(1)(A)) and gives the Bank Board power to apoint FSLIC receiver of a state S&L in certain circumstances (12 U.S.C. 1729(c)(1)(B) and (2)).

When FSLIC is appointed receiver and proceeds to liquidate an S&L in default, it must carry out that process "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v) and (c)(3)(B)), and "pay all valid credit obligations [of the defaulting S&L]" on a pro rata basis in accordance with the Bank Board's resolutions delineating the receiver's powers and duties (12 U.S.C. 1729(b)(1)(B), (c)(1)(A) and (c)(1)(B)(i)(II)). To accomplish these goals, Congress delegated exceedingly broad powers to FSLIC as liquidating

receiver (12 U.S.C. 1729(d)):

> In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

Congress has further provided (12 U.S.C. 1464(d)(6)(C)):

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

When FSLIC acts as a liquidating receiver, it proceeds much like a bankruptcy trustee, marshalling the assets of the S&L and paying "all valid credit obligations" to the extent of available assets and according to the priorities of the obligations. FSLIC exercises these functions in accordance with the receivership regulations designated in the Bank Board resolution appointing the receiver.[3] Among

[3] Congress gave the Bank Board power to issue regulations for the liquidation of insolvent federally-chartered S&Ls in 1933. See Home Owners' Loan Act of 1933, ch. 64, § 5(d), 48 Stat. 133 (codified as amended at 12 U.S.C. 1464(d)(11)). In 1941, the Bank Board promulgated regulations governing FSLIC receiverships of federal S&Ls (6 Fed. Reg. 4413). Those regulations are presently set forth, as amended, at 12 C.F.R. Pt. 549. In 1968, the Bank Board adopted similar

other things, the regulations require FSLIC, at the direction of the Bank Board, to publish a notice to the defaulting S&L's creditors to present their claims to FSLIC by a date specified in the notice (12 C.F.R. 549.4(a), 549.5-1(b)(1), 569a.8(a)).[4] They further direct FSLIC to allow all seasonably filed claims proved to its satisfaction (12 C.F.R. 549.4(b), 549.5-1(b)(2)). If FSLIC disallows a claim it must notify the claimant of the disallowance and the reason therefor (*ibid.*). The regulations provide for Bank Board review of FSLIC disallowances of claims (12 C.F.R. 549.4(b) and (d), 549.5-1(b)(2) and (4)). Claims that are allowed by FSLIC or the Bank Board are paid to the extent that funds are available (*ibid.*).

In response to the growing size, complexity, and number of liquidating receiverships it oversees, the Bank Board has undertaken to revise its regulations to set forth its administrative claims process with greater specificity. On April 21, 1988 it published a set of interim procedures that are to remain in effect until a final regulation is promulgated. The interim procedures have been employed since July 1, 1986 (see 53 Fed. Reg. 13105 (1988)), and thus they have governed the FirstSouth claims process from the outset.

The interim procedures require FSLIC as receiver to send "to all potential claimants of the association [in receivership] as shown on the books and records of the association, or as otherwise may be known to the Receiver * * *, (1) a notice of their right to present claims to the

regulations governing FSLIC receiverships of state S&Ls under 12 U.S.C. 1729(c)(2). See 12 C.F.R. Pt. 569a.

[4] We use the term "creditors" in this context as encompassing all persons with claims against the receivership estate, whether based on contract or tort. See 12 C.F.R. 569a.1-569a.8 (treating all claims against the estate of a state-chartered institution in FSLIC receivership as "creditor" claims).

Receiver, (2) a Proof of Claim form, and (3) a copy of the 'Procedures and Instructions for Filing Claims with the FSLIC as Receiver' " (53 Fed. Reg. at 13107).[5] The last document is a short summary of the interim procedures. Among other things, it informs the claimant that to make a claim he must submit a Proof of Claim form along with "all necessary supporting documentation available to [that] claimant * * *." *Instructions for Filing Claims with the FSLIC as Receiver* 1 (Feb. 12, 1987) [hereinafter *Instructions*].

The initial phases of the claims process are handled by a "Special Representative" appointed by the Director of the Office of the Federal Savings and Loan Insurance Corporation specifically for this purpose (53 Fed. Reg. at 13107). Claims that have not been filed in accordance with the directions contained in the notice and/or Proof of Claim form are returned with an explanation of the deficiencies, and the claimant is given the opportunity to correct them (53 Fed. Reg. at 13107-13108). Properly filed claims are assigned to an agent of the Special Representative for an initial determination whether to allow or disallow each claim (53 Fed. Reg. at 13108). A claim may be allowed in whole based upon the S&L's books and records (*ibid.*). The Special Representative must notify each claimant in writing as to whether the claim is allowed in whole or retained for further review (*ibid.*; *Instructions* 1).

Agents of the Special Representative review each claim that is retained for further review (53 Fed. Reg. at 13108). They are empowered to require additional documentation or written information, access to non-privileged documents in the claimant's custody or control, and sworn

[5] A copy of the *Instructions for Filing Claims with the FSLIC as Receiver* has been lodged with the Clerk of the Court.

written responses to written questions (*ibid.*; *Instructions* 1).[6] Upon evaluating the administrative record, the Special Representative makes a proposed determination of allowance or disallowance (53 Fed. Reg. at 13109). Claimants who are dissatisfied with the proposed determination may submit a request for reconsideration, stating the specific grounds for such request (*ibid.*; *Instructions* 2).[7] After considering the record as supplemented by any request for reconsideration, or, after the time for requesting reconsideration has expired without submission of a request, the Special Representative, on behalf of FSLIC, issues a final determination of allowance or disallowance of the claim (53 Fed. Reg. at 13110; *Instructions* 2). If the claim is disallowed in whole or in part, the Special Representative notifies the claimant and informs him of his right to Bank Board review of the determination (53 Fed. Reg. at 13110; *Instructions* 2).[8] Claimants are given 60 days to file a

[6] The procedures provide for discovery of non-privileged documents in the possession of the receiver (53 Fed. Reg. at 13108). They also provide for inspection of the record by the claimant (*id.* at 13109; *Instructions* 2). The claimant has the right to request that the record be supplemented (*Instructions* 2). The Special Representative has discretion to grant a claimant's request to appear before an agent of the Special Representative to give statements, discuss the claim, or negotiate a settlement of the claim, and indeed may require such appearance (53 Fed. Reg. at 13109). In addition, the Special Representative may request that claimants submit memoranda addressing legal issues bearing on the claim (*ibid.*).

[7] The Special Representative is required to reply promptly in writing to requests for reconsideration, stating whether he agrees or disagrees with the contentions in the request, and setting forth any proposed modifications to the proposed determination (53 Fed. Reg. at 13110; *Instructions* 2). The request for reconsideration and the Special Representative's reply become part of the record (53 Fed. Reg. at 13110).

[8] To facilitate exercise of the right to Bank Board review, the Special Representative is required to send all claimants whose claims

written request for Bank Board review (53 Fed. Reg. at 13111). In addition to the notice, a claimant lodging such a request must provide a statement of the facts and arguments upon which the request is based and a statement of alleged factual and legal errors supported by relevant citations (*ibid.*). The receiver (FSLIC) is entitled to respond to the arguments in the claimant's request within 10 days of receiving it (*ibid.*).

The Bank Board conducts an initial review of the request to determine whether more information is needed (53 Fed. Reg. at 13111).[9] Within 180 days from the date the record is closed, the Board issues a decision on the merits of the appeal (*ibid.*). Alternatively, within 30 days from the date the record is closed, the Board may entertain oral argument, or other supplementary proceedings, in which case a decision will issue within 180 days of the completion of these supplementary proceedings (*ibid.*). If the Board has neither issued an opinion during the 180-day time period nor granted an extension, FSLIC's initial determination stands (*id.* at 13112).

Separate from the claims process are the Bank Board's procedures for obtaining expedited relief. These procedures permit persons to seek Bank Board relief from a decision or threatened action of FSLIC as receiver (53

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are not allowed in full a copy of the Bank Board's *Procedures for the Processing and Determination on Review of Determinations of the FSLIC as Receiver* (53 Fed. Reg. at 13110; *Instructions* 2). These procedures also are published in the Federal Register. See 53 Fed. Reg. at 13110-13112.

[9] If more information is necessary, the Board so notifies the claimant (53 Fed. Reg. at 13111). The record consists of the receiver's record, the request for review, and the receiver's response, if any (*ibid.*). Claimants are entitled to supplement the record upon a showing of good cause (*ibid.*). Upon finding that the record provides a sufficient basis for decision, the Board deems the record closed (*ibid.*).

Fed. Reg. at 13112). For example, if FSLIC issues a notice of foreclosure, the property owner may file a request for expedited relief, asking that the Bank Board instruct FSLIC not to foreclose until there has been a determination on the merits (*ibid.*). To prevail, the petitioner for expedited relief must make the traditional showing necessary for a preliminary injunction (*ibid.*). The Bank Board may issue stays to preserve the status quo pending its decision on the request for expedited relief (*id.* at 13113). The Bank Board's decision on a request for expedited relief is subject to immediate judicial review (*ibid.*).

B. *Proceedings Below*

1. Coit initiated this action against FirstSouth in October 1986 in the 95th Judicial District Court of Dallas County, Texas. In its petition (Pet. App. A9-A16), Coit alleged that in 1983 FirstSouth made it two loans of $20 million and $30 million to purchase two separate tracts of undeveloped land. Under the terms of the loans, Coit was required to give FirstSouth a 25% "profit participation" interest in any profits derived from the eventual sale of the properties. Coit contended that FirstSouth's "profit participation" was in reality interest that, when coupled with the regular accrued interest, made the loans usurious. Coit further alleged that FirstSouth charged "extension fees" for each annual extension of the $30 million loan and required Coit to execute $7.6 million in additional promissory notes. According to Coit, these fees and notes also constituted interest, rendering the $30 million loan usurious. Finally, Coit claimed that FirstSouth orally agreed to allow Coit to draw down funds to improve the property purchased with the $30 million loan, to loan Coit additional funds to carry the interest on the notes, and to renew the notes until the property was sold. Coit charged

that FirstSouth violated this oral agreement in August 1986 by refusing to renew the notes and threatening to foreclose on the property.

Coit sought damages from FirstSouth for charging usurious interest on the loans. Alternatively, Coit requested a declaratory judgment that FirstSouth was in reality Coit's partner by virtue of FirstSouth's profit participation interest and that, as a partner, FirstSouth had breached its fiduciary duty and implied duty of good faith and fair dealing. Coit claimed that FirstSouth's conduct relieved Coit of its obligations under the outstanding notes.

On December 4, 1986, two months after Coit filed this lawsuit, the Bank Board determined that FirstSouth was insolvent "in that the assets of the association [were] less than its obligations to its creditors and others" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)(i)). See pages 4-5, *supra*. At that time, FirstSouth had gross liabilities of $1.7 billion. Based on its determination of insolvency, the Bank Board exercised its authority under 12 U.S.C. (Supp. IV) 1464(d)(6)(A) and (B)(i) to appoint FSLIC as receiver for FirstSouth. FSLIC then substituted itself for FirstSouth as the defendant in Coit's state court litigation and removed the action to the United States District Court for the Northern District of Texas. See 12 U.S.C. 1730(k)(1)(C).

2. Upon removal, FSLIC moved to dismiss Coit's action. In its motion to dismiss, FSLIC argued that, like FirstSouth's other creditors, Coit must submit its claims for initial determination under the administrative claims process. See 12 C.F.R. 549.4. The district court, relying on *North Mississippi Savings & Loan Ass'n* v. *Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), cert. denied, 474 U.S. 1054

(1986), entered judgment for FSLIC.[10] The court stated (Pet. App. A5 (emphasis in original)):

> FSLIC has the exclusive power to determine *all* claims—including those raised in litigation—against the FSLIC, as receiver for a savings and loan association.

On Coit's appeal, the Fifth Circuit upheld the district court's judgment of dismissal (Pet. App. A1-A4). The court of appeals adhered to its previous decisions requiring creditors to present their claims against failed S&Ls to FSLIC for resolution.[11] The court below also concluded that Coit's constitutional challenges to the Bank Board's statutory and regulatory scheme were not ripe for resolution, noting that "FSLIC may allow all or [some] of Coit's claims, depriving Coit of standing and a grievance" (Pet. App. A4).

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[10] In *Hudspeth*, the Fifth Circuit held that creditors of a failed S&L must present their claims to the Bank Board's administrative claims process before "going forward in any court" (756 F.2d at 1103). The Fifth Circuit reasoned that the statutory and regulatory scheme ousts the courts from making the initial determination of the validity of creditors' claims, observing (756 F.2d at 1102):

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

The Fifth Circuit has reaffirmed *Hudspeth* in *Red Fox Industries* v. *FSLIC*, 832 F.2d 340 (1987); *Thomes* v. *Equitable Savings & Loan Ass'n*, 831 F.2d 558 (1987); *FSLIC* v. *Bonfanti*, 826 F.2d 1391 (1987), petition for cert. pending *sub nom. Zohdi* v. *FSLIC*, No. 87-255 (filed Aug. 5, 1987); and *Chupik Corp.* v. *FSLIC*, 790 F.2d 1269 (1986).

[11] The Fifth Circuit denied Coit's request for an initial hearing en banc to reconsider *Hudspeth* (Pet. App. A2 n.1).

3. Coit filed its claim with FSLIC, for approximately $113 million, on September 28, 1987, the deadline established in the notice published by the receiver of FirstSouth. See Pet. Br. A1-A2. As of April 20, 1988, 1,773 creditor claims had been filed against the FirstSouth receivership. Approximately 400 of these claims were filed by shareholders who, in light of FirstSouth's insolvency, cannot reasonably expect to receive any proceeds of the final distribution. Of the remaining non-shareholder claims, 129 have been allowed fully, 21 have been allowed in part and disallowed in part, and 285 have been disallowed. Approximately 500 other claims have been referred to the receiver's counsel for legal advice. Thus far, only five requests have been filed seeking Bank Board review of the Special Representative's determination.

SUMMARY OF ARGUMENT

Congress has entrusted the Bank Board with virtually complete responsibility, to the exclusion of the bankruptcy laws, for liquidating insolvent federal savings and loan associations. The Bank Board, in turn, has established an administrative claims process that permits FSLIC, as receiver, to examine all claims against the S&L in a centralized forum and to determine whether to allow, settle, or disallow each claim. This approach permits the Bank Board and FSLIC to liquidate insolvent S&Ls in an orderly manner, to decide in light of all relevant circumstances whether to settle or disallow each disputed claim, and to make prompt pro rata payments on claims FSLIC allows or settles. The Bank Board quite reasonably believes that this centralized process is the most sensible and efficient method for resolving competing (and often interrelated) claims to a common, limited pool of assets.

Coit objects to the rules the Bank Board has laid down, contending that FSLIC does not and cannot constitutionally have power to "adjudicate" claims. We submit that the proper question, instead, is whether the Bank Board may require each creditor to present its claim to FSLIC and exhaust the administrative claims procedures before pursuing judicial resolution of the claim. We further submit that the Bank Board certainly has that power.

A. The Bank Board has ample authority under its empowering statute, HOLA, to establish an administrative claims process. Section 5(d)(6) of HOLA, as amended, specifically authorizes the Bank Board to reorganize or liquidate an insolvent federal S&L, using FSLIC as receiver for that purpose (12 U.S.C. (& Supp. IV) 1464(d)(6)). Section 5(d)(11) then broadly provides that the Board shall have power to make rules and regulations for the liquidation of associations and the conduct of receiverships (12 U.S.C. 1464(d)(11). That grant of power, read in light of FSLIC's receivership responsibilities under the NHA—including its duties, under the direction of the Bank Board, to liquidate an institution in an orderly manner (12 U.S.C. 1729(b)(1)(A)(v)) and to pay valid credit obligations (12 U.S.C. 1729(b)(1)(B)), and its power to settle or compromise claims (12 U.S.C. 1729(d))—authorizes the Bank Board to create an administrative mechanism for evaluating creditor claims. FSLIC cannot liquidate a failed institution in an orderly manner unless it has an efficient procedure for identifying all creditors, sorting out their relationships, and determining the nature, size, and validity of their claims.

The Bank Board's power to establish an administrative claims process necessarily includes the power to insist that creditors participate in and complete the administrative procedures before pursuing a judicial resolution. The basic objective of the claims process—namely, to cen-

tralize and, to the extent possible, resolve without litigation all claims against a limited pool of assets—would be nullified if claimants could pursue court action without completing the claims process. HOLA itself requires that courts respect the Bank Board's administrative processes: Section 5(d)(6)(C) provides that the courts shall not "restrain or affect the exercise of powers or functions" of the receiver (12 U.S.C. 1464(d)(6)(C)).

There is, of course, nothing novel in requiring potential litigants to pursue and exhaust their administrative remedies before seeking judicial relief. All of the familiar principles of administrative law that ordinarily justify exhaustion—such as the need for uniform, consistent and efficient resolution of disputes—take on special significance when creditors press claims against a common, finite pool of assets that must bear the costs of litigating the validity of any particular claim. The Bank Board's administrative claims process permits an expert agency to develop the facts and attempt to resolve interrelated disputes without recourse to complex and expensive litigation. That process, in turn, benefits the claimants as a whole by preventing wasteful application of the estate's assets toward the determination, rather than payment, of claims.

B. In this case, the district court dismissed Coit's suit for lack of subject matter jurisdiction based on the Fifth Circuit's reasoning that failure to exhaust deprives a court of jurisdiction. We believe that where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the claimant's obligation to exhaust the administrative claims process does not deprive the court of jurisdiction. The court should either dismiss the action without prejudice to renewal following exhaustion or stay the action pending exhaustion. We therefore suggest that it would be appropriate for this Court to vacate the court of appeals' decision with directions to remand the case to the district court for consideration whether to dismiss the action without prejudice or to stay the action pending Coit's completion of the administrative claims process.

C. Coit presents a series of constitutional objections to the Bank Board's administrative claims process premised on the notion that the Bank Board has authorized FSLIC to "adjudicate" claims. The court of appeals properly dismissed those claims as unripe. We believe that, in any event, the power conferred by HOLA and the NHA should not be characterized as a power of "adjudication." Hence, even if Coit's constitutional objections were ripe, they would have no bearing on the proper resolution of this dispute.

ARGUMENT

ONCE THE FEDERAL HOME LOAN BANK BOARD PLACES AN INSOLVENT FEDERAL SAVINGS AND LOAN ASSOCIATION IN RECEIVERSHIP, A CREDITOR MUST PRESENT HIS CLAIM AGAINST THE ASSOCIATION TO FSLIC AND EXHAUST THE ADMINISTRATIVE PROCEDURES FOR ALLOWANCE BEFORE PURSUING A JUDICIAL RESOLUTION OF THE CLAIM

Congress gave the Bank Board virtually complete responsibility for the liquidation of federal savings and loan associations. An S&L cannot seek protection under the bankruptcy laws (11 U.S.C. (& Supp. IV) 109). Instead, Congress gave the Bank Board "power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations * * * and for the conduct of conservatorships and receiverships" (12 U.S.C. 1464(d)(11)). And Congress gave FSLIC broad-ranging powers to act as receiver in connection with the liquidation of federally chartered S&Ls, subject only to the regulation of the Bank Board (12 U.S.C. 1729(d)). Con-

gress expected that these broad grants of power to expert agencies would provide a swift, efficient method of liquidating S&Ls, would maintain public confidence in those institutions, and would serve the best interests of depositors, other creditors, and the public.

The Bank Board has adopted regulations requiring that all claims against an S&L in receivership must be presented to FSLIC for examination in the first instance and to the Bank Board for review of any decision with which the claimant is dissatisfied. The Bank Board has consistently taken the position that this process must be exhausted before a claimant may press its claim in any other forum. The establishment of this process and the requirement that it be exhausted are not only well within the Bank Board's plenary authority to make rules and regulations governing liquidations and receiverships, they are indispensable to the fair and efficient conduct of those proceedings.

The Bank Board had numerous reasons for insisting that the receiver have the first opportunity to resolve all claims. FSLIC should not be forced to engage in even preliminary litigation of claims it may be prepared to pay or settle. FSLIC will have some familiarity with the affairs of the debtor because of its insurance and regulatory activities, and it will quickly gain more detailed familiarity in the exercise of its receivership responsibilities; as a result, the receiver is well situated to evaluate claims efficiently, to give comparable claims similar treatment, and to deal fairly with related or competing claims. And because of its familiarity with the overall condition of the estate, the receiver can deal with claims against an insolvent debtor in light of a realistic assessment of their likely worth as demands upon the limited pool of assets comprising the receivership estate.

Funneling all claims through the receiver enables the receiver to assess the overall conditions of the receivership;

to decide how many and which claims it should settle; to allow claimants (who hold competing claims against the S&L's limited assets) to participate appropriately in the evaluation of others' claims; and to make prompt partial distributions when the size and nature of disputed claims have been determined. The Bank Board's administrative claims process thus contributes immeasurably to an orderly liquidation. Allowing each claimant to bypass this procedure and initially press his claim in any otherwise available court or other forum, wherever located, at any time of the claimant's choosing within the applicable statute of limitations, would be—and the word is not too strong—a disastrous way to resolve an insolvent institution's affairs.

Coit and its amici direct their arguments to the conceptual question whether Congress has granted FSLIC "authority to adjudicate creditor claims" (Pet. Br. 8), a question they believe the Fifth Circuit decided in *North Mississippi Savings & Loan Ass'n* v. *Hudspeth, supra*. But while the *Hudspeth* opinion strongly suggested that FSLIC has that power, *Hudspeth*'s narrow holding did not necessarily reach that far.[12] Whatever the scope of the

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[12] The Fifth Circuit affirmed a district court's dismissal of Hudspeth's lawsuit alleging breach of an employment contract on the ground that Section 5(d)(6)(C) of HOLA (12 U.S.C. 1464(d)(6)(C)) "prevents him from going forward in any court before seeking [Bank Board] review" (756 F.2d at 1103). The court did not specifically hold that FSLIC has adjudicatory power, but it did state that the Bank Board's view that FSLIC is empowered to decide claims as part of its receivership function is "entitled to our deference" (*ibid.*) and that "Hudspeth can challenge the FSLIC's action before the [Board], and if unsatisfied, can seek judicial review under the [Administrative Procedure Act]" (*ibid.*). The Ninth Circuit has since read *Hudspeth* as validating the Bank Board's position that FSLIC possesses adjudicatory authority and has ruled, in response, that "FSLIC has no power to adjudicate creditor claims." *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*,

Hudspeth decision, we seek to defend the decision in the present case only on the ground that the Bank Board and FSLIC plainly do have power to require claimants first to present their claims to FSLIC, and exhaust the administrative process leading to allowance, settlement, or disallowance, before pursuing such judicial remedy as may then be available.[13]

Our contention is that the Bank Board has acted within its authority by requiring creditors to present their claims to FSLIC and exhaust the administrative procedures under which FSLIC and the Bank Board decide whether to allow, compromise, or disallow each claim.[14] If a claimant

811 F.2d 1209, 1218 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987). The Fifth and Ninth Circuits now view themselves in square conflict on this question. Compare *ibid.* with Pet. App. A2.

[13] The Bank Board, litigating this case below independently of the Justice Department under 12 U.S.C. 1464(d)(1), has asserted that the process of allowing or disallowing claims is an administrative "adjudication" subject to judicial review under the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 701 *et seq.* The Solicitor General does not endorse that position; instead, he defends the judgment below to the extent that it requires a creditor to present his claim to FSLIC and exhaust the claims review process before suing on the claim.

[14] The Solicitor General accordingly petitioned for a writ of certiorari in *FSLIC* v. *Stevenson Associates,* No. 87-451 (filed Sept. 17, 1987) and *FSLIC* v. *Murdock-SC Associates,* No. 87-452 (filed Sept. 17, 1987) and acquiesced in a petition for a writ of certiorari in *Zohdi* v. *FSLIC,* No. 87-255 (filed Aug. 5, 1987) to address the following question:

> Whether claims against the assets of an insolvent federally insured savings and loan association must be presented in the first instance in federal receivership proceedings in accordance with the Federal Home Loan Bank Board's regulations for the administrative resolution of such claims.

As we explained at the petition stage here (Memorandum for the Respondent 2), this same question controls the present case.

has properly presented his claim in accordance with the Bank Board's regulations and FSLIC and the Bank Board have determined to disallow it, the claimant may then bring suit and obtain a judicial resolution of the claim. In such a case FSLIC would generally expect to contend that the plaintiff is limited to the claim he presented to FSLIC and the Board (and must rely on the legal theory and evidence he offered in its support). The procedures followed and determinations reached in the administrative process may of course bear upon and constrain the judicial resolution in various ways. But petitioner's contention that the process prescribed by the Bank Board's regulations will deprive it of its day in court is both premature and wrong.[15]

A. The Bank Board Has Authority To Require That All Creditors Of A Federal Savings And Loan Association That Is In Receivership Submit Their Claims To FSLIC, As Receiver, For Allowance Or Disallowance, Before Pursuing A Judicial Remedy

1. The Great Depression prompted Congress to enact a series of statutes, chiefly HOLA and the NHA, that authorize the Bank Board and FSLIC to create, oversee, and liquidate the affairs of federal savings and loan associ-

[15] It should be noted that petitioner's claim is, purely, a pre-receivership claim against the insolvent S&L. The case would be altogether different if petitioner were challenging, in whole or in part, the receiver's exercise of its own powers and discretion. HOLA and the NHA make it clear that in respect of the exercise of its own powers as receiver, FSLIC is answerable only to the Bank Board. See page 5, *supra.* This Court ruled long ago that the actions of the Comptroller of the Currency and a receiver appointed by him, in resolving the affairs of an insolvent national bank, are subject to challenge only for bad faith or fraud. *Adams* v. *Nagle,* 303 U.S. 532, 540-542 (1938). There is no reason why the Bank Board's and FSLIC's actions should be subject to challenge on any lesser ground.

ations. See pages 2-3, *supra*. As this Court has explained, "Congress delegated to the Board broad authority to establish and regulate 'a uniform system of [savings and loan] institutions where there are not any now' " (*Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 166 (1982) (citation omitted)), and "the Board has exercised that discretion, regulating comprehensively the operations of these associations" (*id.* at 166-167). This comprehensive scheme of federal regulation extends from the association's " 'cradle to its corporate grave' " (*id.* at 145 (citation omitted)).

One of the most important responsibilities of the Bank Board and FSLIC is to settle the affairs of failed associations expeditiously and fairly. An S&L is not eligible to become a bankrupt. Instead, Section 5(d) of HOLA, as amended, empowers the Bank Board to reorganize or liquidate an insolvent federal association, using FSLIC as receiver for that purpose (12 U.S.C. (& Supp. IV) 1464(d)(6)(A) and (D)). The Board has "exclusive power and jurisdiction to appoint a conservator or receiver" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)). "If in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)).

Under HOLA and the NHA, an S&L receivership is a fundamentally administrative--not a judicial--process. The Board has responsibility for setting the rules—even the most basic ones—under which receiverships are conducted. HOLA provides in the broadest terms that the Board "shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, * * * and for the conduct of conservatorships and receiverships * * *" (12 U.S.C.

1464(d)(11)). Furthermore, no court may interfere with the exercise of the receiver's powers: "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver" (12 U.S.C. 1464(d) (6)(C)). As this Court observed with respect to the Bank Board's similarly worded authority to regulate lending practices, " 'it would have been difficult for Congress to give the Bank Board a broader mandate' " (*de la Cuesta*, 458 U.S. at 161 (citation omitted)). "Congress set out the general framework and left many of the details to the Board" (*id.* at 164). See *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947).[16]

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[16] Congress's choice of a statutory receivership as a means of liquidating failed associations had historical antecedents. The equity courts originated the concept of a receivership as a means for administering property subject to the court's jurisdiction, and court-conducted receiverships assumed importance in the 19th century as a means of reorganizing and liquidating financially embarrassed business entities, especially railroads. See, *e.g.*, 1 R. Clark, *A Treatise on the Law and Practice of Receivers* 4-5, 13-14 (3d ed. 1959); 3 R. Clark, *supra*, at 1560-1561. When Congress authorized the federal chartering of national banks, it adopted the receivership concept as the statutory mechanism for liquidating failed institutions (*id.* at 1601-1602) and later specified that the Federal Deposit Insurance Corporation would serve as receiver (*id.* at 1671-1675). See generally 12 U.S.C. 191 *et seq.*; 12 U.S.C. 1821. Under this statutory receivership scheme, "the receiver acts as an agent or agency or officer of the government and not as an officer of the court" (3 R. Clark, *supra*, at 1675-1676). See *In re Chetwood*, 165 U.S. 443 (1897). Thus, HOLA and the NHA were written against the backdrop of preexisting statutory receivership law. See H.R. Rep. 1922, 73d Cong., 2d Sess. 4 (1934) ("Adequate provision is made for the liquidation of insured institutions somewhat similar to the plan for the liquidation of banks which are under Federal deposit insurance."). Accord *Fahey* v.

The NHA sets out FSLIC's authority to conduct a statutory receivership in similarly broad terms and makes clear that it is the Bank Board alone to which FSLIC is responsible in carrying out its receivership functions. FSLIC, acting as receiver, "is authorized—(i) to take over the assets of and operate such association; (ii) to take such action as may be necessary to put it in a sound solvent condition; (iii) to merge it with another insured institution; (iv) to organize a new Federal association to take over its assets; (v) to proceed to liquidate its assets in an orderly manner; or (vi) to make such other disposition of the matter as it deems appropriate; whichever it deems to be in the best interest of the association, its savers, and the Corporation * * * " (12 U.S.C. 1729(b)(1)(A)). Congress specified that, in carrying out its liquidation responsibilities, FSLIC "shall have the power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necesary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board * * * " (12 U.S.C. 1729(d)). Congress also plainly contemplated that FSLIC as receiver would process the claims against the S&L. Congress instructed FSLIC to "pay all valid credit obligations of the association" (12 U.S.C. 1729(b)(1)(B)), imposing a statutory obligation that would be superfluous if the receiver were expected to await a court's instruction to pay each claim.

Mallonee, 332 U.S. 245, 250 (1947). See also, *e.g.*, G. Glenn, *The Law Governing Liquidation* 391-412 (1935); Note, *Legislation: Statutory Control Over the Dissolution of Building and Loan Associations*, 35 Colum. L. Rev. 265 (1935); Note, *The Appointment of Receivers for National Banks*, 44 Harv. L. Rev. 618 (1930). One difference between thrift and national bank liquidations is that that National Bank Act expressly assumes that creditors may present their claims for court determination. See 12 U.S.C. 194. The NHA does not.

2. The Bank Board's broad authority under Section 5(d)(11) of HOLA to establish rules for the conduct of receiverships, read in light of FSLIC's broad responsibility to liquidate a failed association "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)) and to "pay all valid credit obligations" (12 U.S.C. 1729(b)(1)(B)), clearly includes the power to establish a mandatory procedure for FSLIC determination and Bank Board review of creditor claims. Indeed, without such a procedure, FSLIC could hardly perform its receivership function.

The creditors of an insolvent S&L have competing claims against a common pool of assets that is, by hypothesis, insufficient to pay all claims. Moreover, the creditors frequently have complex relationships with the association and other creditors; they may be both borrowers and lenders (or shareholders); may have joint or competing interests in specific assets; may have jointly participated as borrowers or lenders; or have provided financing to one another. Thus, it is widely agreed that FSLIC cannot liquidate a failed association "in an orderly matter" unless it has an efficient mechanism for identifying all creditors, sorting out their relationships, and determining the nature, size, and likely validity of their claims against the estate. See *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*, 811 F.2d 1209, 1218 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987).

Both efficiency and fairness require that all claims be channelled through FSLIC. A centralized process permits FSLIC to give like treatment to similarly situated creditors and, in some cases, to settle a group of like claims on similar terms. Where a number of claims arise from a single transaction (such as a construction financing, involving developers, contractors, and other lenders), FSLIC can evaluate those claims in relation to one

another. Perhaps most important, FSLIC can protect the interests of all creditors by making rational judgments about whether to settle or disallow claims. The actual value of a claim depends not only on its face amount and validity but also on the likely percentage recovery by claims in that class; in many cases, FSLIC cannot make a rational judgment whether to pay, compromise, or disallow a claim until it has had an opportunity not only to examine the claim's own factual and legal merits but also to assess the likely aggregate assets and liabilities of the receivership estate so as to estimate whether the cost of disallowing the claim and defending disallowance exceeds its true worth as an obligation of an insolvent debtor. This process is important to all creditors because the cost of litigating claims is an administrative expense of the estate.

The Bank Board acted both within its authority under Section 5(d) of HOLA and sensibly when it created a mandatory claims process that permits FSLIC to be informed of all claims against the receivership estate, to estimate their merit, and to resolve as many as possible without litigation. The Bank Board's regulations permit FSLIC to scrutinize each claim (see pages 6-11, *supra*), which in turn allows FSLIC to make a reasoned decision whether to recognize the claim as a valid obligation of the estate or to disallow the claim. See *Morrison-Knudsen Co.*, 811 F.2d at 1218 (emphasis omitted). ("The administrative process that the regulation prescribes authorizes FSLIC and the Board, by disallowance of a claim and notice to the claimant, to determine whether a dispute exists."). There is, we submit, no question under this Court's precedents that the Bank Board's creation of this administrative claims process is a valid exercise of its broad power under Section 5(d)(11) to make rules and regulations for the conduct of receiverships. See, *e.g.*, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (recognizing the

"well established" standard that a regulation promulgated under a broad grant of rulemaking power "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation' ") (quoting *Thorpe* v. *Housing Authority,* 393 U.S. 268, 280-281 (1969)).[17]

3. Coit appears to concede that the Bank Board's regulations give FSLIC "the right in the first instance to decide whether to pay or refuse to pay a claim" (Pet. Br. 25; see also *id.* at 26). It maintains, however, that it cannot be obligated to submit its claim to FSLIC and complete the Bank Board claims process before proceeding (or, in this case, proceeding further) in court. The core question in this case is therefore whether the Bank Board could lawfully require that claimants submit to and exhaust the administrative claims process as a condition to pursuing a judicial remedy. We submit that the answer is "yes."

The Bank Board's power under Section 5(d)(11) of HOLA to establish an administrative claims process necessarily includes the power to insist that creditors participate in and complete the administrative procedures before seeking judicial relief.[18] The point of the administrative

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[17] See also *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744-745 (1984); *FCC* v. *Schreiber,* 381 U.S. 279, 292 (1965); *American Trucking Ass'ns* v. *United States,* 344 U.S. 298 (1953); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 321-322 (1933).

[18] The Bank Board's regulations require presentation and exhaustion by providing that claimants must submit their claims in a timely manner (12 C.F.R. 549.4 (a)) and that only claims that were allowed by the receiver or approved by the Board shall be paid by the receiver (12 C.F.R. 549.4(d)). FSLIC therefore uniformly seeks dismissal of suits against the receivership estate where – as here – the claimant has failed to exhaust the claims process (see J.A. 27-29), and it has followed that practice since the advent of its regulations in 1941 (see note 19, *infra*). The Bank Board's interim claim procedures expressly state that judicial remedies are available only after exhaustion of the administrative procedures. 53 Fed. Reg. 13106 (1988).

claims procedure is to centralize the initial consideration of claims and to avoid resort to the courts with respect to the claims that FSLIC can resolve. These objectives are part of the statutory goal of liquidating the association "in an orderly manner" (12 U.S.C. 1729(b)(1)(A)(v)), and they would not be achieved if claimants could pursue court action without completing the claims process. It follows that the Board's requirement of presentation and exhaustion, like the creation of the claims process itself, is a valid exercise of its Section 5(d)(11) rulemaking power because it too is " 'reasonably related to the purposes of the enabling legislation.' " *Mourning*, 411 U.S. at 369 (quoting *Thorpe*, 393 U.S. at 280-281). Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975) ("The statutory scheme is thus one in which the [agency] may specify such requirements for exhaustion as [it] deems serve [its] own interests in effective and efficient administration.").[19]

[19] The Bank Board has consistently imposed this exhaustion requirement since its original promulgation of its receivership regulations in 1941 (6 Fed. Reg. 4413)). For example, FSLIC was sued, in circumstances resembling those in *Hudspeth*, shortly after the promulgation of the regulations in connection with the liquidation of Community Federal Savings & Loan Association. FSLIC contested that suit on the ground, among others, that the claimant "had not filed with the receiver his claim in accordance with notice to all creditors, duly published, and that the failure to do so barred the maintenance and prosecution of this action * * *." *Community Federal Savings & Loan Ass'n* v. *Fields*, 128 F.2d 705, 706 (8th Cir. 1942). The claimant responded that a FSLIC agent had orally denied the validity of the claim and that "this oral denial estopped the defendants from asserting the failure to file the claim with the receiver in bar of the prosecution of the suit" (*id.* at 707). The court found that the claim was invalid on its face, and therefore did not address the exhaustion issue (*id.* at 709). FSLIC's defense and the claimant's response demonstrate, however, that FSLIC and S&L creditors have long understood FSLIC's regulations to impose a presentation and exhaustion requirement.

To be sure, HOLA itself does not say, in terms, that claimants must present their claims to the receiver and exhaust that process before proceeding in court. But it does make clear that courts are not to "restrain or affect" the receiver's exercise of its functions: "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver [appointed by the Bank Board], or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver" (12 U.S.C. 1464(d)(6)(C)). As Coit concedes (Pet. Br. 12-13), the express statutory functions of the receiver include the duty to "liquidate [the estate's] assets in an orderly manner," the power to "settle, compromise or release claims," and the power "to do all other things that may be necessary in connection therewith." See 12 U.S.C. 1729(a), (b), and (d). The Bank Board has determined that FSLIC cannot effectively perform its functions if it must confront claims in the first instance through litigation in any court available to any claimant. Conversely, it is no stretch whatever to conclude that forcing the receiver to litigate individual claims (and use the estate's assets to do so) before it has had an opportunity to assess those claims in relation to the situation of the estate as a whole would "affect" the receiver's exercise of its lawful functions. The effect of Section 5(d)(6)(C) therefore is to prohibit judicial proceedings on a creditor's claim until FSLIC has had an opportunity to determine, in accordance with its mandatory adminsitrative claims process, whether to pay, settle or disallow the claim.[20]

[20] Coit's citations (Pet. Br. 16-17) to *Morris* v. *Jones*, 329 U.S. 545 (1947), and *Riehle* v. *Margolies*, 279 U.S. 218 (1929), are, in this context, misplaced. *Morris*, which relies on *Riehle*, states that a Missouri lawsuit against an Illinois insurance company undergoing liquidation in an Illinois court does not amount to a "challenge to the possession

This is a case where the statutory language, while not specific, is dispositive because of the breadth of the shield that it places around the agency's discretion to devise the means by which it will carry out its broad mandate. HOLA authorizes the Bank Board to devise the basic design of the receivership process and specifies that the Bank Board supervises and regulates the receivership; the NHA defines the powers and functions of the receiver; and HOLA prohibits a court from taking any action that would "restrain or affect" the exercise of those powers and functions. There is nothing in the sparse legislative history of Section 5(d)(6)(C) to indicate that this provision was meant to provide anything short of the broad shield its plain language suggests.[21]

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of the liquidator" because "[t]he establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court" (*Morris*, 329 U.S. at 548, 549). The issue in the present case, however, is not possession. It is whether a claimant's suit to establish the amount of the claim would "restrain or affect" FSLIC's express authority under the NHA and the Bank Board's regulations to determine whether to pay the claim without litigation. Moreover, the Court indicated in both *Morris* and *Riehle* that the common law rule identified in those cases can be modified by federal statute. See *Morris*, 329 U.S. at 552-553 (citing bankruptcy practice); *Riehle*, 279 U.S. at 228 (accord).

[21] Congress added Section 5(d)(6)(C) to HOLA in 1966 as part of a general revision to clarify and expand the scope of the Bank Board's powers. See Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, Tit. I, § 101(a)(9), 80 Stat. 1034. The Senate Committee's section-by-section analysis states that Section 5(d)(6)(C) "would, in effect, limit the jurisdiction of a court to order the removal of a conservator or receiver, except in an action for removal brought by an association under authority of [Section 5(d)(6)(A)] * * * or, except at the instance of the Board, to restrain the exercise of the powers or functions of a conservator or receiver." S. Rep. 1482, 89th Cong., 2d Sess. 14 (1966); see also 112 Cong. Rec. 6891 (1966) (setting forth the Bank Board's identical description). The House Committee's report does not discuss the provision. See H.R. Rep. 2077, 89th Cong., 2d Sess. (1966).

4. There is nothing novel in requiring potential litigants to pursue and exhaust their administrative remedies before seeking judicial relief. The Court has repeatedly recognized the "well established" doctrine " 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' " *McKart* v. *United States*, 395 U.S. 185, 193 (1969) (quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). As the Court has explained, in "cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). "This is so even though the facts after they have

Congress further amended HOLA in 1968 to authorize the Bank Board to appoint FSLIC as receiver for federally-insured state-chartered institutions. Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294. The accompanying Senate report categorically reiterated that "Section 5(d)(6)(C) provides that no court may * * *, except at the instance of the Board, restrain or affect the exercise of powers or functions of a receiver." S. Rep. 1263, 90th Cong., 2d Sess. 10 (1968). It specifically observed in the following sentence that the NHA authorizes FSLIC, as receiver, to liquidate institutions "in an orderly manner," adding (*ibid.*):

> In carrying out its receivership responsibilities, the committee expects the FSLIC to give due consideration to the interest of all of the claimants upon the assets of the association * * *. The authority of the FSLIC in this regard would be subject only to the regulation of the Federal Home Loan Bank Board and not to that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution.

Thus, the Senate Committee understood that Section 5(d)(6)(C) would prohibit courts from interfering with FSLIC's administrative consideration of claims.

been appraised by specialized competence serve as a premise for legal consequences to be judicially defined" (*ibid.*). All of the familiar principles of administrative law that ordinarily support a requirement of exhaustion are reinforced, in the receivership context, by the fact that claims are against a common pool of assets that must bear the cost of litigating the validity of any particular claim.

As the Court has stated, "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi* v. *Davidson,* 405 U.S. 34, 37 (1972) (citations omitted). In the receivership context, where claims are likely to be of kinds with which the Bank Board and FSLIC has repeated experience, and where specific facts and circumstances often have a common bearing on groups of claims or all claims, this consideration has even more than its usual force.

The Court has also observed that "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" (*Far East Conference,* 342 U.S. at 574-575). "Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene" (*McKart,* 395 U.S. at 195). Again, the circumstances of a receivership reinforce these points in several ways. Uniformity and consistency are

especially important when claimants have similar or related claims against a common and limited pool of assets. And efficiency in the receivership context conserves not only the judiciary's resources but the asset pool itself. Claimants obviously have a strong interest in conserving the receivership assets for their mutual benefit through efficient resolution of each other's claims.

"Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures" (*McKart,* 395 U.S. at 195). This is perhaps the most forceful point of all. A receivership is an arena in which the "squeaky wheel" principle, if not checked, would often afford the most favorable outcomes to those who can most effectively threaten to delay the process and impose unnecessary costs. Without the Bank Board's centralized claims process the division of the common and limited pool of assets would too often depend on which claimant could force the most favorable settlement by threatening to impose on the estate the procedural costs and delays of litigation in another forum.

The Bank Board's requirement that claimants exhaust the administrative claims process is consistent with the factors generally identified as supporting exhaustion.[22] For

[22] For example, Professor Davis cites the following considerations as supporting exhaustion:

> [1] need for factual development, [2] importance of reflecting agency's expertise or policy preferences in the final result, [3] probability that the agency will satisfactorily resolve the controversy without judicial review, [4] protection of agency processes from impairment by avoidable interruption, [5] conservation of judicial energy by avoiding piecemeal or interlocutory review, and [6] providing the agency opportunity to correct its own errors.

4. K. Davis, *Administrative Law Treatise* § 26:1, at 415 (2d ed. 1983). See 5 B. Mezines, J. Stein & J. Gruff, *Administrative Law* § 49.01 (1987).

example, FSLIC is normally in the best position to "develop the necessary factual background upon which decisions should be based" (*McKart*, 395 U.S. at 194). FSLIC must come to understand the circumstances of the estate, and often must in any event learn much about the circumstances relevant to the factual merits of a particular claim. The decision whether to pay, settle, or disallow a claim will then often require agency exercise of discretion and expertise.[23] Finally, claimants frequently are "successful in vindicating [their] rights in the administrative process" (*McKart*, 395 U.S. at 195). FSLIC's experience indicates that the administrative claims process results in the satisfactory resolution of many creditor claims, through allowance or settlement, without the need for

[23] FSLIC has special expertise as to the vast majority of contested claims against receivership assets. These claims tend to involve transactions and legal questions that are the subjects of Bank Board regulations. See, *e.g.*, 12 C.F.R. 545.32-545.53, 563.9-3 (regulating loan practices); 12 C.F.R. 563.9-8 (regulating real estate transactions); 12 C.F.R. 563.5, 563.7-2, 563.7-4, 563.7-5, 563.8-1, 563.13-2, Pts. 563d, 563g (regulating issuance of securities). For example, a substantial percentage of disputed claims both in number and dollar terms arise out of loan participation agreements. These agreements arise when more than one lender is involved in making a loan; such loans often tend to be quite complicated transactions. See Drake & Weems, *Mortgage Loan Participations: The Trustee's Attack*, 52 Am. Bankr. L.J. 23 (1978); Stahl, *Loan Participation: Lead Insolvency and Participants' Rights (Part I)*, 94 Banking L.J. 882 (1977). S&Ls often enter into participation loans as a means of complying with the Bank Board's regulations limiting the amount any one S&L can lend to a single borrower. See 12 C.F.R. 563.9-3. In regulating ongoing S&Ls, therefore, FSLIC and the Board constantly review participation loan agreements for their consistency with the regulations, and the Board even issues advisory opinions on the subject. FSLIC and the Board are thus thoroughly familiar with the various permutations of participation loans and are well-suited to evaluate claims arising from such loans.

judicial proceedings. For example, in the FirstSouth liquidation, FSLIC has thus far reviewed 435 claims and has allowed in full or in part, 150 of those claims. Many of the remaining claims may be susceptible to settlement.[24]

None of the commonly cited reasons for *not* requiring exhaustion is applicable here.[25] Claimants suffer no irreparable injury by virtue of being required to exhaust administrative remedies.[26] There is no basis for contending

[24] *McKart* also identified a separation of powers justification for exhaustion. The exhaustion doctrine is, in part, " 'an expression of executive and administrative autonomy' " (*McKart*, 395 U.S. at 194, quoting L. Jaffe, *Judicial Control of Administrative Action* 425 (1965)). "The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction" (395 U.S. at 194). "This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise" (*ibid.*). Thus, exhaustion is especially appropriate here, where Congress has given the Bank Board and FSLIC plenary authority over S&L liquidations.

[25] Professor Davis cites the following factors as supporting an exception to the principle of exhaustion:

> [1] irreparable injury to a party from pursuing the administrative remedy, [2] clear absence of agency jurisdiction, [3] clear illegality of the agency's position, [4] a dispositive question of law peculiarly within judicial competence, [5] the futility of exhaustion, and [6] expense and awkwardness of the administrative proceeding as compared with inexpensive and efficient judicial disposition of the controversy.

4 K. Davis, *supra*, § 26:1, at 414-415. See also 5 B. Mezines, J. Stein & J. Gruff, *supra*, § 49.02.

[26] Exhaustion, of course, may or may not in a particular instance delay the resolution of a particular claimant's claim; but the timing of payment will generally depend on the efficiency with which the receiver can resolve all claims sufficiently to permit a distribution to creditors. The Bank Board's regulations also provide avenues for relief in the event that submission to the administrative claims process

that FSLIC "lacks jurisdiction" or has taken a "clearly illegal position": FSLIC is clearly entitled to an opportunity to evaluate claims and, indeed, it cannot have a position – legal or otherwise – until it has the opportunity to evaluate each claim. FSLIC rarely finds itself faced with "a dispositive question of law peculiarly within judicial competence." In fact, many claims are highly fact-oriented, or involve legal issues with which FSLIC and the Bank Board have special expertise, or both. Nor is exhaustion futile. Many, if not most, claims are allowed in full or settled during the administrative process. Finally, the administrative process is not more expensive and awkward than judicial disposition of the controversy. In many cases, it will eliminate the need for judicial resolution; in the remaining cases it will, often, eliminate the need for discovery by establishing facts not in contention, narrowing the issues and the defining the precise contours of the dispute.[27]

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should result in extraordinary hardship. The regulations expressly provide for expedited or emergency relief upon a showing of likelihood of success on the merits and irreparable harm. See *Instructions* 1; *Procedures for the Administration and Determination of Requests for Expedited Relief from Decisions or Threatened Actions of the FSLIC as Receiver*, 53 Fed. Reg. 13112-13113 (1988). The Bank Board's denial of such emergency relief is subject to judicial review (*id.* at 13113).

[27] Coit provides no persuasive basis for believing that resort to the administrative process will generally delay the final resolution of creditor claims. Coit's only support (Pet. Br. 22 n.19) is the isolated case of amicus Hudspeth's claim, which has been pending with the receiver for two and one-half years. See also Hudspeth Amicus Br. 5-8. Hudspeth's situation is hardly typical of the administrative process. For example, of the 103 claims filed against the Liberty Federal S&L receivership, which had a claims deadline of December 10, 1987, 63 have already been resolved. These 63 claims took an average of only 47 days to resolve. This Court need look no further than its own docket for additional evidence of the efficiency of the administrative process. The claimants in *Morrison-Knudsen Co.* v. *CHG, Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987), all brought their claims to the administrative forum, where settlements were quickly reached. (Accordingly, the Solicitor General intends to ask the Court to dismiss that petition as moot.)

In sum, all of the generally recognized factors favoring exhaustion are present here and all of the factors favoring an exception to exhaustion are absent. Even Coit has conceded (Pet. Br. 26) that "FSLIC has the right in the first instance to decide whether to pay or refuse to pay a claim; and the Board can overrule FSLIC's decision just as the management of an insurance company can overrule the decision of a claims adjuster. However, if the ultimate administrative decision is not to pay, the resulting dispute must then be resolved by the courts." This is an exhaustion requirement, plain and simple.[28]

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[28] It is also instructive that even the Ninth Circuit, which otherwise disagreed with FSLIC's position, has recognized that FSLIC's "interest in applying its expertise, correcting its own errors, making a proper record, and maintaining an efficient, independent administrative system" justifies imposing an exhaustion requirement in particular cases. See *Morrison-Knudsen Co.* v. *CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (1987), petition for cert. pending *sub nom. FSLIC* v. *Stevenson Associates*, No. 87-451 (filed Sept. 17, 1987). The Ninth Circuit erred, however, in believing that the salutary purposes of the exhaustion doctrine could be achieved simply by requiring lower courts to determine whether exhaustion should be required on a case-by-case basis. Forcing FSLIC to litigate the exhaustion question in every case would foster uncertainty, waste administrative and judicial resources, disrupt the administration of the receivership, and lead to precisely the same problems as the exhaustion requirement is designed to prevent.

B. The District Court Should Either Have Dismissed Coit's Suit Without Prejudice Or Stayed The Action Pending Coit's Submission To And Exhaustion Of The Bank Board's Administrative Claims Process

As the foregoing discussion demonstrates, Congress has authorized the Bank Board to establish a regulatory scheme whereby FSLIC, as receiver of a failed S&L, determines through an administrative claims process whether to allow, settle, or disallow creditor claims against the receivership estate. If FSLIC agrees to allow the creditor's claim or a satisfactory settlement is reached, the matter is resolved without resort to the courts. Where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the need to exhaust the administrative remedy does not deprive the court of jurisdiction, and the court should either dismiss without prejudice to renewal of the claim at the end of the administrative process or stay its proceedings for that period.

As we have explained (pages 21-37, *supra*), the Bank Board's presentation and exhaustion requirement is binding on the courts by virtue of Section 5(d)(6)(C) of HOLA, which provides that "no court may * * * restrain or affect the exercise of powers or functions of a conservator or receiver" (12 U.S.C. 1464(d)(6)(C)), together with provisions of the NHA that identify FSLIC's receivership responsibilities and state that FSLIC shall carry out those functions "subject only to the regulation of the Federal Home Loan Bank Board" (12 U.S.C. 1729(d)). Federal and state courts must withhold action on creditor suits against an insolvent institution because obliging FSLIC to respond to such a suit before it has completed the claims process prescribed by the Bank Board would "restrain or affect" FSLIC's exercise of its powers and the discharge of its function to determine, in accordance with the Bank

Board's regulations, whether to pay, settle, or disallow creditor claims.

In this case, FSLIC removed Coit's pending state suit to federal district court pursuant to 12 U.S.C. 1730(k)(1)(C), which gives FSLIC the right (with an exception not here relevant[29]) to remove any civil suit to which it is a party. FSLIC then moved to dismiss on alternative grounds, citing both a lack of subject matter jurisdiction and Coit's failure to state a claim on which relief could be granted. See J.A. 27. The district court apparently believed that the Fifth Circuit's *Hudspeth* decision, which implicitly ruled that lack of exhaustion deprives a court of jurisdiction, required it to dismiss on the former ground. In the Solicitor General's view, it is not accurate to say that Section 5(d)(6)(C) limits the subject-matter jurisdiction conferred by 12 U.S.C. 1730(k)(1).[30] Rather, it prohibits a court, vested with jurisdiction over the cause, from taking action or giving relief that would interfere with the receiver's functions. We therefore suggest that it would be appropriate for this Court to vacate the court of appeals' decision with directions to remand the case to the district court for consideration whether to dismiss Coit's suit or to stay the action pending Coit's exhaustion of the Bank Board's administrative claims process.

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[29] A proviso to Section 1730(k)(1) excludes certain suits involving state-chartered institutions. The Solicitor General recently filed a petition for a writ of certiorari in a case involving the interpretation of the proviso to Section 1730(k)(1). See *FSLIC* v. *Ticktin*, No. 87-1865 (filed May 12, 1988).

[30] There is evidence supporting the jurisdictional approach. The 1966 Senate Committee that drafted and reported Section 5(d)(6)(C) tersely stated that the section "would, in effect, limit the jurisdiction of a court" to restrain the powers or functions of the receiver. S. Rep. 1482, 89th Cong., 2d Sess. 14 (1966). See note 21, *supra*.

C. Petitioner's Constitutional Challenges Are Not Properly Raised In This Case

Coit presents (Pet. Br. 35-50) a series of constitutional objections to the Bank Board's administrative claims process, arguing that resort to that process violates Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment's guarantee of the right to a jury trial. The court of appeals did not reach those objections. It concluded, quite properly, that the constitutional questions were "not yet ripe for resolution" (Pet. App. A4) because "FSLIC may allow all or some of Coit's claims, depriving Coit of standing and a grievance" (*ibid.*). See, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974); *Poe* v. *Ullman* 367 U.S. 497, 504-505 (1961); *Liverpool, New York & Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

Coit's constitutional objections all rest on the premise that the Bank Board has authorized FSLIC to "adjudicate" claims. While we believe Congress would have considerable latitude to provide for administrative adjudication of claims against a federally chartered institution that has become insolvent, we do not believe that the power conferred by HOLA and the NHA should be characterized as a power of "adjudication." It is the power to pay valid claims, to settle claims, or to disallow and thereby contest claims. If contested, the claimant can take his claim to court for judicial resolution. Accordingly, even if they were ripe, Coit's constitutional objections would have no bearing on the proper resolution of this dispute.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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JUNE 1988

Section 5(d)(6)(C) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(6)(C), provides:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver [appointed by the Federal Home Loan Bank Board], or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

Section 5(d)(11) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464(d)(11), provides:

> The Board shall have power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, for the merger of associations with associations or with any institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, for associations in conservatorship and receivership, and for the conduct of conservatorships and receiverships; and the Board may, by regulation or otherwise, provide for the exercise of functions by members, directors, or officers of an association during conservatorship and receivership.

Section 406 of the National Housing Act, 12 U.S.C. 1729, provides in relevant part:

* * * * *

(b) Powers of Corporation on default of Federal Savings and Loan Associations

(1) In the event that a Federal association is in default, the Corporation shall be appointed as conservator or receiver and as such –

(A) is authorized –

(i) to take over the assets of and operate such association;

(ii) to take such action as may be necessary to put in in a sound solvent condition;
(iii) to merge it with another insured institution;
(iv) to organize a new Federal association to take over its assets;
(v) to proceed to liquidate its assets in an orderly manner; or
(vi) to make such other disposition of the matter as it deems appropriate;

whichever it deems to be in the best interest of the association, its savers, and the Corporation; and
(B) shall pay all valid credit obligations of the association.

* * * * *

(d) Additional powers of Corporation

In connection with the liquidation of insured institutions, the [Federal Savings and Loan Insurance] Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

Pertinent regulations of the Federal Home Loan Bank Board provide in relevant part (12 C.F.R. 549.4):

(a) When directed to do so by the [Bank] Board, the receiver shall promptly publish a notice to the association's creditors to present their claims, with proof thereof, to the receiver by a date specified in the notice * * *. Claims filed after the specified date shall be disallowed, except as the [Bank] Board may approve them for whole or part payment from the association's assets remaining undistributed at the time of approval. The receiver shall mail a similar notice to any creditor shown on the association's books at the creditor's last address appearing thereon.

(b) The receiver shall allow any claim seasonably received and proved to its satisfaction. The receiver may wholly or partly disallow any creditor claim or claim of security, preference, or priority not so proved, and shall notify the claimant of the disallowance and the reason therefor. * * * Unless, within 30 days after notice is mailed, the claimant files a written request for payment regardless of the disallowance, disallowance shall be final, except as the [Bank] Board may otherwise determine.

* * * * *

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